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IN THE

Supreme Court of the United States

COLLEEN B. WILCOX, *et al.*,
Cross-Petitioners,

v.

UNITED STATES EX REL. JOHN DAVID STONER,
Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS *AMICI CURIAE* IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." First enacted in 1863, the FCA's liability provision does not include a definition of the word "person." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not "person[s]" amenable to *qui tam* suits under the FCA. Although the Court expressed "serious doubt" as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities.

2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST OF THE *AMICI CURIAE*	1
BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS *AMICI CURIAE* IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI	4
SUMMARY OF ARGUMENT	4
REASONS TO GRANT CERTIORARI	7
I. THE COURT OF APPEAL'S EXPANSION OF "PERSON" UNDER THE FCA IS WITHOUT PRECEDENT	7
II. THE DECISION BELOW OVERRIDES CONGRESSIONAL POLICY	14
III. THE DECISION BELOW THREATENS STATE SOVEREIGNTY	16
CONCLUSION	23
APPENDIX A — Member Listing of *Amici Curiae*	1a
APPENDIX B — Original and Current Language of 42 U.S.C. § 1983	19a

TABLE OF CONTENTS—Continued

Page

APPENDIX C — Sample of Federal Regulations Auditing States with respect to Federally Funded Programs 21a

APPENDIX D — States and Their State-Official Indemnification Policies 23a

TABLE OF AUTHORITIES

CASES **Page**

Atchison, Topeka & Sante Fe Railway Co. v. O'Connor,
223 U.S. 280 (1912) 13

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) 7

Edelman v. Jordan,
415 U.S. 651 (1974) 6, 19-21

Ford Motor Co. v. Dep't of Treasury,
323 U.S. 459 (1945) 20

Great Northern Life Ins. Co. v. Read,
322 U.S. 47 (1944) 20

Hafer v. Melo,
502 U.S. 21 (1991) 12-13, 22

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 22

Kentucky v. Graham,
473 U.S. 159 (1985) 12, 21, 22

Matthews v. Rodgers,
284 U.S. 521 (1932) 13

Monroe v. Pape,
365 U.S. 167 (1961) 12, 13, 22

Moor v. County of Alameda,
411 U.S. 693 (1973) 12, 22

Myers v. Anderson,
238 U.S. 368 (1915) 12, 22

Osborn v. Bank of the United States,
22 U.S. (9 Wheat.) 738 (1824) 13

TABLE OF AUTHORITIES—Continued

Page

Scheuer v. Rhodes,
416 U.S. 232 (1974) 12, 22

Piokowski v. Parziale,
2003 U.S. Dist. LEXIS 7624
(D. Conn. 2003) 15

United States v. McNinch,
356 U.S. 595 (1958) 7

United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman,
536 U.S. 925 (2002) 12

United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932
(8th Cir. 2001), *cert. denied sub nom.* 12

United States ex rel. Burlbaw v. Orenduff,
No. 06-2006 (10th Cir.
Argued Mar. 5, 2007) 12

United States ex rel. Burlbaw v. Regents of N.M. State Univ., 324 F. Supp.2d 1209
(D.N.M. 2004), *appeal pending sub nom.* ... 12

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1052 (N.D. Cal. 2001) 12

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(W.D. Wash. 1986) 15

TABLE OF AUTHORITIES—Continued

Page

Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) 12, 22

Wilson v. Layne, 526 U.S. 603 (1999) 22

Wood v. Strickland, 420 U.S. 308 (1975) 12, 22

CONSTITUTION AND STATUTES

U.S. Const. amend. XI. 19

18 U.S.C. § 666 ..... 6, 15

31 U.S.C. § 3729(a) 2, 7

31 U.S.C. § 3729(b) 2, 18

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 11

Evan Caminker, *The Constitutionality of Qui Tam Actions*, Yale L.J. 341 (1989) ... *passim*

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TABLE OF AUTHORITIES—Continued

Page

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The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81 (1972)..... 8-10, 13

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TABLE OF AUTHORITIES—Continued

Page

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Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" Article III*, 91 Mich L. Rev. 163 (1992) 10

Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859 (2000) 22

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

This amicus curiae brief is submitted on behalf of the Statewide Association of Community Colleges ("SWACC"), Southern California Regional Liability Excess Fund ("SCR"), Northern California Regional Liability Excess Fund ("NCR"), and Schools Association For Excess Risk ("SAFER").[1] These amici are joint powers authorities ("JPAs"), formed to meet the self-insurance needs of the community colleges and K-12 school districts in the State of California. The JPAs are risk pools where members cooperatively pool contributions of public funds to afford themselves different types of risk protection, including, tort liability coverage. These amici share a commitment to minimize the excess-liability risks that member school districts and community colleges face. This commitment ensures that public funds appropriated for schools and community colleges truly benefit students of the State of California.

SWACC represents a majority of community college districts in California. NCR consists of over 400 K-12 school districts, county offices of education, regional occupational programs, and other public educational entities. SCR represents ninety-two

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no other than SWACC, SCR, NCR, SAFER and their counsel made a monetary contribution to the preparation or submission of this brief.

California public educational agencies. SAFER provides the excess liability coverage to SWACC, NCR, and SCR liability pools, representing approximately 50% of the total average daily attendance of the students in the State of California. For a complete list of respective members of these amici, *see* App. A.

Pursuant to the memorandum of coverage governing each of these amici, the JPAs provide excess liability coverage to a member's officials or employees, while acting for or on behalf of the member. Coverage extends not only to damages compensable to claimants but also to expenses, including costs and fees, incurred in the investigation and defense of claims against such officials or employees.

For the first time in the long history of the FCA, and admittedly in disagreement with other courts, the court of appeal below announced that state employees may be sued in their individual[2] capacities under the FCA for actions taken in the course of their official duties. Under the FCA, a liable defendant is subject to civil penalties as great as $11,000 per claim, as well as treble damages and attorneys' fees. 31 U.S.C. § 3729(a). FCA liability does not require proof of specific intent to defraud, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).

The cross-petition implicates the important interest of amici JPAs in protecting the fiscal health of schools and community colleges in the State of California. For almost a century and a half since

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[2] In this brief, "individual" and "personal" are used interchangeably.

Congress adopted the FCA, it has been generally understood that state officials were not subject to FCA liability either in their official or individual capacities for actions taken in the course of their official duties. Until the decision of the court of appeals in this case, state officials have not been targeted by FCA *qui tam* plaintiffs.

Accordingly, the holding below undeniably poses anew huge personal liability risk to state officials. It would dramatically change the FCA landscape since it opens without limit FCA *qui tam* litigation against state officials. In turn, these amici JPAs would have to additionally assess FCA liability risks, for which damages may easily reach millions of dollars, if awarded against state officials whose duties regularly involve administering federally funded programs. In order to guarantee adequate defense and liability protection of state officials from FCA *qui tam* claims, the holding below—if not addressed—would necessarily require a significant increase of publicly funded contributions to group self-insured public education risk pools from their respective members. As States face burgeoning budget deficits, where public education funds are expectedly subject to major cuts, the holding below comes at an inopportune time for schools, community colleges, and their students. Without the Court's intervention, students would be deprived of diminishing public monies the States allocate for their students' educational needs, instead of requiring these funds to be used for defending and funding awards against public school officials.

Based on their collective interests in minimizing the liability risks schools and community colleges face and in ensuring that students receive the

maximum benefit from public funds appropriated for their education, SWACC, NCR, SCR, and SAFER respectfully request that this Court consider the following arguments in support of petitioners' cross-petition for writ of certiorari.

BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS *AMICI CURIAE* IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The Court must grant the cross-petition for writ of certiorari to review the decision below. The holding is inconsistent with the history of the informer *qui tam* mechanism generally and specifically under the FCA. It is also a questionable expansion of the scope of damage suits against state officials in their individual capacities. It supplants congressional policy in dealing with the sovereign States. It raises constitutional challenges, particularly from the Eleventh Amendment.

Notwithstanding the disagreement among federal courts, review is necessary because the decision below permits informer *qui tam* actions against state officials without precedent. The history of the *qui tam* mechanism reveals that the early Colonies inherited the unique tradition from England. At the time, several statutes had authorized private citizens, who suffered no personal injury, to sue others for legal violations and as an incentive receive a portion of the statutory fines. The Federal Gov-

ernment subsequently adopted similar statutory mechanisms authorizing informer *qui tam* actions, but the provisions were intended to enforce penal laws. By the time Congress adopted the FCA in 1863 federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials. Accordingly, the FCA informer *qui tam* mechanism was originally enacted to stop private defense contractors from defrauding the Federal Government during the Civil War. The FCA has undergone several amendments, but none suggest a broadening of the undefined term "person" to include States or their officials. The legal practice, from the time of the FCA's original adoption in 1863 until even after Congress rekindled the informer *qui tam* mechanism in 1986, confirms this understanding as well. It was only recently that informers began to target the States and—post-*Stevens*—their officials as FCA defendants.

It turns out, however, that the scope of federal suits against state officials in their individual capacities for official actions is historically also very limited. Such suits are permitted only where plaintiffs claim to have actually suffered an individuated injury, in the form of either wrongful taxation or civil rights violation. Thus, the decision below again without precedent broadens the scope of suits against state officials to include actions where the *qui tam* plaintiff was not personally aggrieved.

Furthermore, the Court should grant the cross-petition for writ of certiorari because the decision below supplants congressional policy in dealing with the several States. Rather than permitting private citizens to file suits against States and their officials, Congress has adopted specific and detailed auditing

and internal-control policies within the frameworks of the various federal programs in which States participate. In addition, two years prior to the 1986 amendment of the FCA, Congress specifically addressed state-employee fraud by enacting 18 U.S.C. § 666, which criminalized such conduct. Under the numerous auditing regulations and penal statute, Congress did not authorize a private cause of action.

Lastly, the holding below raises more constitutional questions, specifically from the Eleventh Amendment. Allowing informer *qui tam* actions against state officials poses a very serious danger to the States, a supermajority of which is facing huge budget deficits. In the State of California alone the gap is projected at $24.3 billion for fiscal year 2008-2009. Given the nature of the informer *qui tam* mechanism, where in the past years billions of dollars of *treble* damages have been recovered against private defendants, the fiscal peril to the States is undeniable. To dismiss the Eleventh Amendment challenge, the court of appeal below cites civil rights cases but failed to explain or distinguish *Edelman v. Jordan*, 415 U.S. 651 (1974), which held that States are entitled to invoke their sovereign immunity where the action is *essentially* one for the recovery of money from the States. Moreover, the court of appeal's use of the distinction between official- and personal-capacity suits when applied in the context of informer *qui tam* actions would practically result to grossly unfair consequences, particularly when the state official did not personally benefit. Finally, since the application of the informer *qui tam* mechanism against state officials is not historically supported, the unavailability of official immunity as a defense in order to establish FCA individual-capacity suits

against state officials is doubtful. With this uncertainty and all the other reasons stated in this brief, we urge the Court to grant the cross-petition for writ of certiorari.

REASONS TO GRANT CERTIORARI

I. THE COURT OF APPEAL'S EXPANSION OF "PERSON" UNDER THE FCA IS WITHOUT PRECEDENT

Since the FCA's adoption in 1863 and despite subsequent Congressional amendments the word "person" in the FCA has remained unchanged and undefined. *See Vermont Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 783, n. 12 (2000); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003). Thus, to determine the meaning of the word "person" as it is used in what is now § 3729(a) courts are instructed to look for guidance to the FCA's history from its original adoption. *See Stevens*, 529 U.S. at 783, n. 12 (2000); *Chandler*, 538 U.S. at 125; *United States v. McNinch*, 356 U.S. 595, 599 (1958) (finding that the FCA "was not designed to reach every kind of fraud practiced on the Government").

Accordingly, in determining whether States are "persons" under the FCA, the Court found that the FCA was enacted in 1863 to principally stop the massive frauds large private contractors perpetrated during the Civil War. *Stevens*, 538 U.S. at 781. The Court established that the original FCA liability provision bore no indication that States were subject to its penalties. *Ibid.* Further, in light of the presumption against imposition of punitive damages against governmental entities, the punitive nature of FCA damage provisions were found to be inconsistent

with state *qui tam* liability. *Id.* at 784-785. Thus, the Court concluded that States are not "persons" subject to FCA liability. *Stevens*, 529 U.S. at 787. Since the statutory analysis provided a conclusive answer, the Court declined to discuss whether or not an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment. *Ibid.* The Court, however, claimed that "there is a 'serious doubt' on that score." *Stevens*, 529 U.S. at 787, citation omitted.

Guided by *Stevens*, the court of appeal below held that school districts and county offices of education are also not "persons" subject to FCA liability because they are arms of the State for purposes of the Eleventh Amendment. However, expressly claiming to rely only on the plain language of the statute, the court of appeal below held that state officials in their personal capacities for actions taken within the scope of their official duties are "persons" who may be liable under the FCA, even if said officials did not personally benefit. In so holding, the decision below violated the principle enunciated in *Stevens*, ignored the history of the FCA, and expanded without precedent the reach of informer *qui tam* actions, where the Federal Government does not intervene, to include state official liability suits.[3]

The history of *qui tam* actions has been extensively chronicled. *See Stevens*, 529 U.S. at 769, 775-777; Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972) (hereinafter *History*); Evan

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[3] Throughout this brief, state official liability suits are suits instituted by private citizens for damages against state officials in their personal capacities for actions taken within the scope of their official duties.

Caminker, *The Constitutionality of Qui Tam Actions*, Yale L.J. 341 (1989) (hereinafter *Constitutionality*). Briefly, the *qui tam* action arose in the thirteenth century as a means of allowing plaintiffs to pursue private claims in England's royal courts, which had previously heard only cases involving interests of the Crown. *Stevens*, 529 U.S. at 776. In the fourteenth century, Parliament began adopting statutory mechanisms for bringing *qui tam* actions. *Id.* Parliament's enactments resulted in the development of two kinds of *qui tam* statutes. One type allowed injured parties to seek relief on their own behalf as well as the Crown's. *Id.* at 775. More relevant here is the other type—those that entitled informers to a portion of a wrongdoer's fine, regardless of whether the informer had suffered any personal injury as a result of the statutory violation (informer *qui tam* actions). *Id.* Problems with vexatious and collusive informers later developed, and statutes were passed to either deter and penalize vexatious informers or repeal old statutes. *Id.*; *History*, *supra*, at 89. By the seventeenth century, the two forms of statutory *qui tam* were subject to such different procedural limitations as to make them quite dissimilar. *History*, *supra*, at 90.

The unique English tradition of *qui tam* became part of American law upon the establishment of English Colonies in America. *History*, *supra*, at 93-97. *Qui tam* actions appear to have been similarly prevalent in America at least in the period immediately before and after the framing of the Constitution. *Stevens*, 529 U.S. at 776. Colonies, however, apparently did not allow common-law *qui tam* actions probably because American lawyers in the Colonies were unfamiliar with their use to bring suits in royal as opposed to local courts and because

the popularity of common-law *qui tam* actions had dwindled in England by that time. *Stevens*, 529 U.S. at 776; *History*, *supra*, at 94. Nevertheless, Colonies did pass several informer statutes expressly authorizing *qui tam* actions. *Stevens*, 529 U.S. at 776. Similar to the English experience, Colonies faced abuses by informers. *History*, *supra*, at 97.

The early federal experience with *qui tam* was quite similar to that of the States', except that federal *qui tam* statutes focused more in enforcing penal laws. *History*, *supra*, at 99, n. 105. The First and subsequent early Congresses routinely authorized informer *qui tam* provisions to enforce diverse interests, such as the prohibition of importing liquor without the payment of a duty, of trading slaves with foreign countries, and of trading with Indian tribes in violation of federal regulations. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality*, *supra*, at 342, n. 3. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L. Rev. 163, 175 (1992) (hereinafter *Standing*). Most of these early *qui tam* statutes have long been repealed, and of those remaining, most lie essentially dormant. *Constitutionality*, *supra*, at 342, n. 5. By the time of the enactment of the FCA in 1863, it seems clear that federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials in their official dealings with the Federal Government. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality*, *supra*, at 342, n. 3, *Standing*, *supra*, at 175.

Thus, although the liability provision of the original FCA has undergone various changes, none suggest a broadening of the term "person" to include

States[4] or, pertinent here, their officials. *See Stevens*, 529 U.S. at 782; Thomas A. Colthurst & Shelley R. Slade, *Healthcare-Care Fraud and the False Claims Act: The Supreme Court Supports a Federal Weapon*, 10 Bus. L. Today, Sept./Oct. 2000, at 24, 26 (stating that the FCA was sparingly used prior to the late 1980s); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 541-542, n. 8 (indicating that pre-1986 statutes generated relatively little FCA litigation) (hereinafter *Eradication*). In fact, even after Congress amended the FCA in 1986 to re-invigorate its use, informers (or even perhaps the federal attorneys general) still did not initially file FCA cases against the States or their officials. *See* Janet Goldstein & John Phillips, *The False Claims Act in Practice, in Qui Tam: Beyond Government Contracts* 469, 480 (John T. Boese ed., 1993) (stating that, from 1986 through 1993, approximately seventy-five percent of FCA *qui tam* cases had been filed against defense contractors). Eventually by the early 1990s, informers sought to use the FCA against the States. *See* Kary Klismet, Note, *Quo Vadis, "Qui Tam"? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 Iowa L. Rev. (2001) 283, 292-293, n. 57. However, the Court put to rest such FCA *qui tam* suits since, as previously explained, States were held not to be "persons" liable under the FCA. *Stevens*, 529 U.S. at 787.

Informers, as here, despite the long history of federal informer *qui tam* statutes and of the FCA, now attempt to overcome *Stevens* and ultimately

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[4] Hereinafter "States" also include arms of the State.

reach the States by targeting their officials. *See e.g., United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), *cert. denied sub nom. United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, 536 U.S. 925 (2002); *United States ex. rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052 (N.D. Cal. 2001); *United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp.2d 1209 (D.N.M. 2004), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir. Argued Mar. 5, 2007). This recent and novel development of suing state officials for FCA liability appears to digress from historical legal practice of federal informer *qui tam* actions, yet the court of appeal below stamped its approval by claiming that such suits are permissible against state officials in their individual capacities. The court of appeal below claimed to draw support from case law involving state official liability suits, primarily *Hafer v. Melo*, 502 U.S. 21 (1991).

Hafer, 502 U.S. 21, addressed whether or not state officials may be sued in their individual capacities under 42 U.S.C. § 1983 (hereinafter section 1983). It turns out that for more than a century and a quarter state official liability suits have found its most widespread use in civil rights actions under section 1983. *See generally Hafer*, 502 U.S. 21; *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961); *Myers v. Anderson*, 238 U.S. 368 (1915). In contrast to the FCA, however, section 1983 was expressly directed to the States. *See* App. B. *Monroe*, 365 U.S. at 183. Moreover, section 1983 cases reveal that in those

cases plaintiffs' claims arise from deprivations of individual plaintiffs' "constitutional rights, privileges and immunities by an official's abuse of his position." *Hafer*, 502 U.S. at 27 (quoting *Monroe*, 365 U.S. at 172).

Historically, in addition to section 1983 cases, state official liability suits have also been permitted in cases involving unconstitutional taxation. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 858 (1824). In *Osborn v. Bank of the United States*, the Court ruled that the Eleventh Amendment did not bar a suit against Ohio state officials for recovery of money taken from the plaintiff bank under an unconstitutional tax provision. *Id.* at 741-744, 858. Later in 1912, the Court similarly held that a plaintiff corporation may recover back from the Secretary of State of Colorado taxes it paid under protest since the state tax imposed an unconstitutional burden on interstate commerce. *Atchison, Topeka & Sante Fe Railway Co. v. O'Connor*, 223 U.S. 280, 286 (1912); *cf. Matthews v. Rodgers*, 284 U.S. 521, 528 (1932).

Review of cases dealing with state official liability suits demonstrates that such suits are limited to actions where plaintiffs actually suffered an individuated injury in the form of either wrongful taxation or civil rights violation. Obviously, individuated injury is what informer *qui tam* actions lack. *See Stevens*, 529 U.S. at 773 ("A *qui tam* relator has suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."); *History*, *supra*, at 85 ("In comparison with the aggrieved party, an informer was motivated by the chance of gain, not by the need for recovery.");

Constitutionality, *supra*, at 345 ("The *qui tam* litigant is not personally injured by the defendant's challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution."). Thus with the decision below, the court of appeal independently authorized informer *qui tam* actions as a mechanism to commence state official liability suits. This contrived result does not follow the histories of the FCA, of federal informer *qui tam* actions, and of state official liability suits.

II. THE DECISION BELOW OVERRIDES CONGRESSIONAL POLICY

Not only does the decision below ignore the history of the FCA, but it also supplants congressional policy in dealing with the several States. In adopting the FCA, Congress recognized that detecting fraud against the federal treasury often is extremely difficult for the Federal Government without the aid of informers. *See* S. Rep. No. 345, at 4, reprinted in 1986 U.S.C.C.A.N. 5266 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

In dealing with States, however, Congress has not expressed the need to utilize informers to detect fraud. Rather, to ensure state compliance and to deter state-official fraud, Congress has adopted specific and detailed auditing and internal-control policies within the frameworks of the various federal programs in which States participate. *See* App. C. In these federal funding schemes, Congress has particularly selected various members of the Executive Branch, such as inspectors general of involved de-

partments, to conduct or supervise audits on the States or their agencies. Therefore, it appears that Congress has decided to assign the duty to detect state-official fraud of federal funds to particular federal officials and not to *qui tam* informers.

Moreover, two years prior to the 1986 revitalization of the FCA, Congress amended Title 18 of the United States Code to add section 666, which specifically criminalizes fraud committed by an "agent" of the State or local government. *See* 18 U.S.C. § 666 (added Oct. 12, 1984, Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In its original form, state officials who violated section 666 were punishable for a maximum imprisonment of ten years and a fine not more than $100,000 or an amount equal to twice that which was obtained in violation of the section, or whichever was greater. Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In 1986, the same year that Congress amended the FCA, Congress reorganized section 666 and removed the penalty provisions to coincide with federal sentencing guidelines. Act of Nov. 10, 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612. Courts generally understand that section 666 does not create a private cause of action. *See Piokowski v. Parziale*, 2003 U.S. Dist. LEXIS 7624 at *27 (D. Conn. 2003); *Whitmire v. United States Veterans Admin.*, 661 F.Supp. 720 (W.D. Wash. 1986).

Considering the special relationship the Federal Government has with the States, Congress has enacted numerous regulations and statutes that specifically address state-official fraud; none of which incorporate informer *qui tam* mechanisms. In connection with the history of the FCA, the court of appeal, by authorizing informer *qui tam* actions

against state officials, appears to have legislated new means of overseeing appropriations of federal funds to the States.

III. THE DECISION BELOW THREATENS STATE SOVEREIGNTY

Finally, the decision below appears to violate the doctrine that courts must interpret statutes so as to avoid difficult constitutional questions. *See Stevens*, 529 U.S. at 787. Holding that state officials in their personal capacities for actions taken within the scope of their official duties are "persons" under the FCA faces a significant hurdle brought by the Eleventh Amendment.[5]

Permitting informers *qui tam* to pursue FCA actions against state officials even in their individual capacities presents a very serious danger to the States. More than half of the States, including some of the Nation's largest, are facing an estimated $40 billion in combined shortfalls in their fiscal year 2009 budgets. Elizabeth C. McNichol & Iris J. Lav, *25 States Face Total Budget Shortfall of at Least $40 Billion in 2009; 6 Others Expect Budget Problems*, Center on Budget and Policy Priorities, *at* http://www.cbpp.org/1-15-08sfp.pdf (last modified April 29, 2008), at 2. On average, the shortfall is 8.6% of the States' general fund budgets. *Id.* Some of the States' budget gaps are expected to last for several fiscal years. *Id.* Similar to how States have in the past

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[5] In addition, the Due Process Clause of the Fourteenth Amendment, the Appointments Clause of section 2 and the "take care" Clause of section 3 of the United States Constitution similarly raise difficult constitutional questions arising from the holding below.

addressed fiscal problems, States would be expected to cut services like health and education. *Id.* at 3.

With respect to the State of California, it projects a revised state budget gap of $24.3 billion for fiscal year 2008-2009. *See* Governor's Budget May Revision 2008-2009 *at* 1, *at* http://www.ebudget.ca.gov/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf (last visited May 15, 2008). Due to the State's deepening fiscal difficulties, Medi-Cal expenditures would be cut by $353.2 million. *Id.* at 35. The budget allocation for the State's Department of Corrections and Rehabilitation would be decreased by $115.2 million. *Id.* at 55. The workload budget reduction for the University of California would be $233.4 million. *Id.* at 75. For the California State University, it would be $215.3 million. *Id.* at 76. The expected budget cut for administered child care programs totals $198.9 million. *Id.* at 68. Overall, the budget reductions in education would affect students. *See* Jack O'Connell, *Schools Chief Jack O'Connell Responds to Governor's May Budget Revision*, California Department of Education News Release #08-61, May 14, 2008, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel61.asp (last visited May 15, 2008). "Many teachers and other essential school staff will still face layoffs, classroom sizes are likely to increase, and there is no cost-of-living increase at a time when the cost of gas, food, and other school essentials is increasing." *Id.*

Given the nature of the informer *qui tam* mechanism and attendant expenses associated with it, the fiscal peril to the States would be exponential. As of September 1999, 2959 *qui tam* actions had been filed since 1986, and more than 50% of those cases had been filed only since the beginning of fiscal year

1997. *Eradication*, *supra*, at 542, n. 11. *Qui tam* settlements and judgments totaled well over $9 billion from the enactment of the 1986 amendments through 2005. *See* Sharon Finnegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625, 643-644, n. 155, 156 (2007) (hereinafter *Integrity*). Over the same period, *qui tam* plaintiffs recovered over $1.5 billion in cases where the government intervened, and over $99 million in cases in which the government did not intervene. *See ibid.* Since 2000, the Federal Government has recovered well over one billion dollars in all but one year. *See* Michael Murray, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 Yale L.J. 981 (2008). The grave concern is that these numbers most likely did not even consider the States or their officials. *See Eradication*, *supra*, at 542, n. 11 (explaining that the principal targets of *qui tam* litigation thus far have been the defense industry and health care providers); *Integrity*, *supra*, at 651 (stating that of the $4 billion awarded in FCA *qui tam* actions as of 2001, $2.3 billion was recovered from suits involving the health care industry).

In addition to the damages that could be awarded against state officials, States would also incur other significant burdens resulting from the decision below. Since to hold a person liable for FCA does not require specific intent to defraud, *see* 31 U.S.C. § 3729(b), an overwhelming majority of the States would be confronted with and have to dedicate additional public funds for litigation costs in defense of their state officials. *See* App. D. States might also have to expend funds for preventative measures to reduce the likelihood of a *qui tam* suit. *See* William C. Kovacic,

Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loy. L.A.. L. Rev. 1799, 1827 (1996). Officials might have to resort to internal consensus to avoid sole responsibility for dealings with the Federal Government. *Id.* This would necessitate more bureaucracy and more time but result in less efficiency. *Id.* Conversely, the informer *qui tam* mechanism might turn state employees into opportunistic bounty hunters. *See id* at 1833, 1841.

The court of appeal dismissed the Eleventh Amendment challenge by concluding that the damages would come from the individual defendants and not the state treasury. The court of appeal further indicated that the fact that States may choose to indemnify the employee for judgment rendered against their officials does not bring the Eleventh Amendment into play. In this regard, similar to its statutory construction of "person" under the FCA, the court of appeal attempted to overcome the Eleventh Amendment challenge with a somewhat unconventional explanation. This time it borrowed section 1983 case law and the mechanism of individual-capacity actions. The rationale nonetheless is inconsistent with Eleventh Amendment jurisprudence.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. amend. XI. In *Edelman v. Jordan*, 415 U.S. 651 (1974), plaintiff filed a complaint in a federal district court, individually and as a class representative, seeking declaratory and injunctive relief against former state officials. These officials had allegedly administered

the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. *Id.* at 653. AABD was one of the State's categorical aid programs funded by the State and the Federal Governments. *Id.* Plaintiff specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." *Id.* at 656. Ultimately, the district court ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants. . . ." *Id.* The court of appeal affirmed and, partly due to a conflict with another court of appeal, the Court granted certiorari. *Id.* at 658.

The Court explained that the Eleventh Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman,* 415 U.S. at 651. "While the Amendment by its terms does not bar suits against a State by its own citizens, [the] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. [citations omitted]." *Id.* at 662-663. "'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit *even though individual officials are nominal defendants.*'" *Ibid.* (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (italics added). Thus the rule has evolved that a suit by private plaintiffs to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. *See also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944).

In light of these principles, the Court found that the funds to satisfy the award sought by plaintiff would inevitably come from the general revenues of the State and so would resemble more closely a monetary award against the State itself. *Edelman*, 415 U.S. at 665. The Court also stated that the award in many aspects would be of damages against the State, which to a virtual certainty, would be paid from state funds. *Id.* The Court therefore reversed the district court's order of retroactive payment of benefits found to have been wrongfully withheld. *Id.*

Amici believe that *Edelman*, rather than section 1983 cases, applies in this case. Particularly where fraudulent intent and personal benefit from an alleged false claim are not required to prove FCA liability, an informer *qui tam* FCA action is essentially one for the recovery of money from the State and not the individual defendant. FCA liability against state officials practically would be indemnified by the employer State, thus an award funded by, recovered from, and against the State, times three. The court of appeal below, however, without distinguishing or explaining *Edelman*, seemed to have eased into the conclusion that the FCA *qui tam* action was not against the State.

Furthermore, the limitation of suits against officials in their individual capacities seems unhelpful in this case. Should the state official die pending final resolution of a personal-capacity action, the plaintiff could pursue his action against the decedent's estate. *Kentucky*, 437 U.S. at 167, fn. 11. It would seem illogical and grossly unjust to permit an informer *qui tam* to sue a former official's decedents to recover an award of FCA damages, particularly when allegedly misappropriated funds

could not be traced to the former official's personal assets.

Lastly, the Court has indicated that damages are available against state officials sued in their personal capacities only after the rule is well-established. State officials sued in their personal capacities for committing constitutional torts should be liable for damages only to the extent that the law has become clear and well-known and to the extent that official immunity is therefore not available as a defense. *See Wilson v. Layne*, 526 U.S. 603, 614-615 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, the Court's announcement in *Hafer* that state officials under section 1983 may be sued in their personal capacities for actions taken within the scope of their official duties was nothing new. It was simply a clarification of a previous (and perhaps vague) holding in *Will*, 491 U.S. 58. *Hafer*, 502 U.S. at 22. *See* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 875-876 (2000). Undeniably, the section 1983 rule regarding state official liability was fairly well-established by the time of *Hafer*. *See generally, Kentucky*, 473 U.S. 159; *Wood*, 420 U.S. 308; *Scheuer*, 416 U.S. 232; *Moor*, 411 U.S. 693; *Monroe*, 365 U.S. 167; *Myers*, 238 U.S. 368. In sharp contrast, both the history of and the legal practice under the FCA do not support extending its reach to FCA liability against state officials even in their individual capacities for actions taken within the scope of their official duties.

CONCLUSION

For the reasons stated above, and those stated in the cross-petition, these amici urge the Court to grant certiorari and summarily reverse the decision below.

Respectfully submitted,

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